

ESTTA Tracking number: **ESTTA705231**Filing date: **10/28/2015**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Notice of Opposition**

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Boulder Brands USA, Inc.
Granted to Date of previous extension	10/28/2015
Address	1600 Pearl Street Boulder, CO 80302 UNITED STATES
Attorney information	LARRY H. TRONCO Holland & Hart LLP P.O. Box 8749 Boulder, CO 80302 UNITED STATES docket@hollandhart.com, bdproffitt@hollandhart.com, ltronco@hollandhart.com, mamooore@hollandhart.com

Applicant Information


Application No	86537556	Publication date	06/30/2015
Opposition Filing Date	10/28/2015	Opposition Period Ends	10/28/2015
Applicant	ALDI Inc. 1200 N. Kirk Road Batavia, IL 60510 UNITED STATES		


Goods/Services Affected by OppositionClass 029. First Use: 2015/01/23 First Use In Commerce: 2015/01/23
All goods and services in the class are opposed, namely: Butter substitutes**Grounds for Opposition**


Priority and likelihood of confusion	Trademark Act section 2(d)
Dilution	Trademark Act section 43(c)

Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	3708400	Application Date	04/17/2009
Registration Date	11/10/2009	Foreign Priority Date	NONE
Word Mark	EARTH BALANCE		

Design Mark	
Description of Mark	NONE
Goods/Services	Class 029. First use: First Use: 2008/09/00 First Use In Commerce: 2008/09/00 Peanut butter


U.S. Registration No.	3967828	Application Date	06/08/2010
Registration Date	05/24/2011	Foreign Priority Date	NONE
Word Mark	EARTH BALANCE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 029. First use: First Use: 2010/07/29 First Use In Commerce: 2010/07/29 Soy milk		

U.S. Registration No.	4029021	Application Date	06/07/2007
Registration Date	09/20/2011	Foreign Priority Date	NONE
Word Mark	EARTH BALANCE		
Design Mark			

Description of Mark	NONE
Goods/Services	Class 029. First use: First Use: 2010/07/29 First Use In Commerce: 2010/07/29 milk

U.S. Registration No.	4029650	Application Date	06/08/2010
Registration Date	09/20/2011	Foreign Priority Date	NONE

Word Mark	EARTH BALANCE
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Design Mark	
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Description of Mark	NONE
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Goods/Services	Class 030. First use: First Use: 2011/05/00 First Use In Commerce: 2011/05/00 Mayonnaise; soy mayonnaise
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U.S. Registration No.	4112473	Application Date	06/08/2010
Registration Date	03/13/2012	Foreign Priority Date	NONE

Word Mark	EARTH BALANCE
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Design Mark	
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Description of Mark	NONE
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Goods/Services	Class 029. First use: First Use: 2011/10/05 First Use In Commerce: 2011/10/05 Soy eggnog
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U.S. Registration No.	4203379	Application Date	06/16/2011
Registration Date	09/04/2012	Foreign Priority Date	NONE


Word Mark	EARTH BALANCE
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Design Mark	
Description of Mark	NONE
Goods/Services	Class 029. First use: First Use: 2011/05/00 First Use In Commerce: 2011/05/00 Vegetable-based spreads Class 030. First use: First Use: 2011/05/00 First Use In Commerce: 2011/05/00 Salad dressing

U.S. Registration No.	2237867	Application Date	06/26/1996
Registration Date	04/06/1999	Foreign Priority Date	NONE
Word Mark	EARTH BALANCE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 029. First use: First Use: 1998/02/00 First Use In Commerce: 1998/02/00 butter substitutes, [cheese, lowfat and nonfat cheese substitutes, margarine lowfat and nonfat margarine substitutes,] shortening, [lowfat and nonfat shortening, snack food dips and vegetable oils]		


U.S. Registration No.	4695921	Application Date	07/28/2014
Registration Date	03/03/2015	Foreign Priority Date	NONE
Word Mark	EARTH BALANCE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 029. First use: First Use: 2013/11/00 First Use In Commerce: 2013/11/00 Potato crisps and chips Class 030. First use: First Use: 2014/06/00 First Use In Commerce: 2014/06/00		


	Dried pasta; Macaroni and cheese; Packaged meal kits consisting primarily of pasta or rice; Pasta
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U.S. Registration No.	4392535	Application Date	11/03/2009
Registration Date	08/27/2013	Foreign Priority Date	NONE
Word Mark	SMART BALANCE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 029. First use: First Use: 2007/08/01 First Use In Commerce: 2007/08/01 butter blends comprising butter and butter substitute Class 030. First use: First Use: 2004/00/00 First Use In Commerce: 2004/00/00 salad dressing		

U.S. Registration No.	2952127	Application Date	05/04/2001
Registration Date	05/17/2005	Foreign Priority Date	NONE
Word Mark	SMART BALANCE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 2002/09/00 First Use In Commerce: 2002/09/00 Popped and Processed Popcorn		

U.S. Registration No.	3649833	Application Date	07/01/2008
Registration Date	07/07/2009	Foreign Priority Date	NONE
Word Mark	SMART BALANCE		

Design Mark	
Description of Mark	NONE
Goods/Services	Class 029. First use: First Use: 2005/10/00 First Use In Commerce: 2005/10/00 Peanut butter

U.S. Registration No.	3747526	Application Date	09/09/2008
Registration Date	02/09/2010	Foreign Priority Date	NONE
Word Mark	SMART BALANCE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 029. First use: First Use: 2009/03/14 First Use In Commerce: 2009/04/00 Eggs		

U.S. Registration No.	3865917	Application Date	06/07/2007
Registration Date	10/19/2010	Foreign Priority Date	NONE
Word Mark	SMART BALANCE		
Design Mark			

Description of Mark	NONE
Goods/Services	Class 029. First use: First Use: 2007/10/00 First Use In Commerce: 2007/10/00 milk

U.S. Registration No.	3878157	Application Date	06/07/2007
Registration Date	11/16/2010	Foreign Priority Date	NONE

Word Mark	SMART BALANCE
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Design Mark	
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Description of Mark	NONE
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Goods/Services	Class 029. First use: First Use: 2009/08/00 First Use In Commerce: 2009/08/00 sour cream
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U.S. Registration No.	3958463	Application Date	06/01/2009
Registration Date	05/10/2011	Foreign Priority Date	NONE

Word Mark	SMART BALANCE
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Design Mark	
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Description of Mark	NONE
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Goods/Services	Class 029. First use: First Use: 2009/11/23 First Use In Commerce: 2009/11/23 Olive oil
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U.S. Registration No.	2200663	Application Date	07/01/1996
Registration Date	10/27/1998	Foreign Priority Date	NONE


Word Mark	SMART BALANCE
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Design Mark	
Description of Mark	NONE
Goods/Services	Class 029. First use: First Use: 1996/10/00 First Use In Commerce: 1996/10/00 butter substitutes, cheese, lowfat [and nonfat] cheese [substitutes,] margarine, [lowfat and nonfat margarine substitutes,] shortening, lowfat and nonfat-shortening, [snack food dips] and vegetable oils

U.S. Registration No.	2276285	Application Date	07/01/1996
Registration Date	09/07/1999	Foreign Priority Date	NONE
Word Mark	SMART BALANCE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 1999/02/00 First Use In Commerce: 1999/02/00 mayonnaise [, lowfat and nonfat mayonnaise substitutes, mayonnaise style dressings and salad dressings]		

U.S. Registration No.	2958216	Application Date	07/09/2003
Registration Date	05/31/2005	Foreign Priority Date	NONE
Word Mark	SMART BALANCE OMEGA		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 029. First use: First Use: 2003/08/00 First Use In Commerce: 2003/08/00 [Butter substitutes, cheese, lowfat and nonfat cheese substitutes, margarine, lowfat and nonfat margarine substitutes, shortening, lowfat and nonfat shortening, snack food dips and] vegetable oils		

U.S. Registration No.	3868803	Application Date	04/12/2006
Registration Date	10/26/2010	Foreign Priority Date	NONE
Word Mark	SMART BALANCE OMEGA		

Design Mark	
Description of Mark	NONE
Goods/Services	Class 030. First use: First Use: 2005/10/00 First Use In Commerce: 2005/10/00 Mayonnaise

Attachments	77716694#TMSN.png(bytes) 85056965#TMSN.png(bytes) 77200602#TMSN.png(bytes) 85056989#TMSN.png(bytes) 85056972#TMSN.png(bytes) 85347834#TMSN.png(bytes) 86350081#TMSN.png(bytes) 77864290#TMSN.png(bytes) 77512724#TMSN.png(bytes) 77566103#TMSN.png(bytes) 77980204#TMSN.png(bytes) 77980375#TMSN.png(bytes) 77749193#TMSN.png(bytes) 75127811#TMSN.png(bytes) 78981805#TMSN.png(bytes) Notice of Opposition TRUBALANCE.pdf(60083 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/LARRY H. TRONCO/
Name	LARRY H. TRONCO
Date	10/28/2015

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Boulder Brands USA, Inc., Opposer, v. Aldi, Inc., Applicant.	Opposition No.: Trademark: TRUBALANCE Serial No.: 86/537,556
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NOTICE OF OPPOSITION

Boulder Brands USA, Inc. (“Opposer”), a Delaware corporation with a business address of 1600 Pearl Street, Boulder, Colorado 80302, believes that it will be damaged by the registration of the trademark TRUBALANCE shown in Application Serial No. 86/537,556 (the “Application”) filed by Aldi, Inc. (“Applicant”) and hereby opposes the Application.

As grounds for its opposition, Opposer alleges that, upon actual knowledge with respect to itself and its own actions, and upon information and belief as to other matters:

1. Opposer has, for many years, been engaged in the business of the manufacture, sale, distribution and promotion of food products throughout the United States, including butter substitutes, buttery spreads, vegetable oils, mayonnaise and peanut butter under the well-known SMART BALANCE and EARTH BALANCE trademarks.

2. The SMART BALANCE and EARTH BALANCE marks were first introduced to the public in the U.S. in 1996 and 1998 by Smart Balance, Inc. Smart Balance, Inc. changed

its name to Boulder Brands, Inc. in 2012, and three years later in 2015 it assigned the rights to Boulder Brands USA, Inc.

3. Opposer's SMART BALANCE and EARTH BALANCE marks are the subject of the following federal trademark registrations:

<u>TRADEMARK</u>	<u>REG. NO.</u>	<u>REG. DATE</u>	<u>GOODS</u>
EARTH BALANCE	3708400	Nov-10-2009	Peanut butter (Class 29)
EARTH BALANCE	3967828	May-24-2011	Soy milk (Class 29)
EARTH BALANCE	4029021	Sep-20-2011	Milk (Class 29)
EARTH BALANCE	4029650	Sep-20-2011	Mayonnaise; soy mayonnaise (Class 30)
EARTH BALANCE	4112473	Mar-13-2012	Soy eggnog (Class 29)
EARTH BALANCE	4203379	Sep-4-2012	Vegetable-based spreads (Class 29) Salad dressing (Class 30)
EARTH BALANCE	2237867	Apr-6-1999	Butter substitutes, shortening (Class 29)
EARTH BALANCE	4695921	Mar-3-2015	Potato crisps and chips (Class 29) Dried pasta; Macaroni and cheese; Packaged meal kits consisting primarily of pasta or rice; Pasta (Class 30)
SMART BALANCE	4392535	Aug-27-2013	Butter blends comprising butter and butter substitute (Class 29) Salad dressing (Class 29)
SMART BALANCE	2952127	May-17-2005	Popped and Processed Popcorn (Class 30)
SMART BALANCE	3649833	Jul-7-2009	Peanut butter (Class 29)
SMART BALANCE	3747526	Feb-9-2010	Eggs

			(Class 29)
SMART BALANCE	3865917	Oct-19-2010	Milk (Class 29)
SMART BALANCE	3878157	Nov-16-2010	Sour cream (Class 29)
SMART BALANCE	3958463	May-10-2011	Olive oil (Class 29)
SMART BALANCE	2200663	Oct-27-1998	Butter substitutes, cheese, lowfat cheese, margarine, shortening, lowfat and nonfat shortening, and vegetable oils (Class 29)
SMART BALANCE	2276285	Sep-7-1999	Mayonnaise (Class 30)
SMART BALANCE OMEGA	2958216	May-31-2005	Vegetable oils (Class 29)
SMART BALANCE OMEGA	3868803	Oct-26-2010	Mayonnaise (Class 30)

4. The registrations for each of the marks set forth above (collectively, the “BALANCE Marks”) are valid and subsisting and therefore constitute *prima facie* evidence of the validity of the marks and registrations, and of Opposer’s exclusive rights to use the marks in connection with the goods set forth in these registrations.

5. The foregoing registrations provide constructive notice of Opposer’s ownership of its BALANCE Marks.

6. Registration Nos. 3708400, 2237867, 2952127, 3649833, 2200663, 2276285, and 2958216 are incontestable pursuant to 15 U.S.C. §§ 1065 and 1115(b). Therefore, these registrations constitute conclusive evidence of the validity of the marks and of Opposer’s exclusive right to use these marks in connection with the goods set forth in the respective registrations.

7. Opposer has extensively and prominently advertised its BALANCE Marks in a wide variety of media, including a number of high profile national publications, national television and online advertising.

8. The SMART BALANCE and EARTH BALANCE marks represent two of the leading brands in the Opposer's market category. Opposer's products are sold in grocery stores and supermarkets across the country and generate millions of dollars in sales.

9. Opposer's products, branded under and in connection with the BALANCE Marks have received extensive, unsolicited national media attention for their heart healthy and natural attributes.

10. As a result of Opposer's successful sales, extensive advertising and promotional activities, and receipt of unsolicited media attention, Opposer has built up substantial goodwill and consumer recognition of its products through its trademarks. Opposer's BALANCE Marks are well-known, famous and entitled to the widest scope of protection under the law.

11. On or about February 17, 2015, Applicant filed Application Serial No. 86/537,556 to register TRUBALANCE for "butter substitutes" in International Class 29 claiming a first use date of January 23, 2015.

12. Upon information and belief, Opposer has used its BALANCE Marks since well prior to the Application filing date of the TRUBALANCE Application and any date of first use for the TRUBALANCE mark that can be claimed by Applicant.

13. Similarly, Opposer's BALANCE Marks were registered well prior to the Application filing date and prior to any date of first use for the TRUBALANCE mark that can be claimed by Applicant.

14. The goods identified in the Application directly overlap and compete with the goods offered by Opposer under Opposer's BALANCE Marks.

15. The specimen of use submitted with the Application shows the TRUBALANCE mark is used with trade dress that is a colorable imitation of the Opposer's SMART BALANCE trade dress. In particular, the trade dress used with the respective marks feature the identical green, white and yellow color scheme. The TRUBALANCE and SMART BALANCE marks are displayed within nearly identical oval logos, and the shape of the containers for the respective products are identical. Photographs of the respective marks and their trade dress are displayed below:



COUNT I
Likelihood of Confusion
15 U.S.C. § 1052(d)

16. Opposer realleges and incorporates by reference the preceding allegations of this Notice of Opposition.

17. Since well prior to the filing date of the Application and Applicant's claimed date of first use, Opposer has used the BALANCE Marks in connection with butter substitutes.

18. Applicant's TRUBALANCE mark so resemble Opposer's prior used and registered BALANCE Marks as to be likely, when used in connection with the goods set forth in the Application, to cause confusion, or to cause mistake, or to deceive under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d).

COUNT II
Likelihood of Dilution
15 U.S.C. § 1125(c)

19. Opposer realleges and incorporates by reference the preceding allegations of its Notice of Opposition.

20. Opposer's BALANCE Marks are famous and well known and became famous under 15 U.S.C. § 1125(c) well prior to the filing date of the Application and any priority date upon which Applicant can rely.

21. Applicant's TRUBALANCE trademark so resembles Opposer's prior used and registered BALANCE Marks as to dilute or to be likely to cause dilution of the distinctive quality of Opposer's BALANCE Marks by blurring under section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c).

WHEREFORE, Opposer believes that it will be damaged by registration of the trademark shown in Application Serial No. 86/537,556 and respectfully requests that the opposition be sustained, and that registration to Applicant be refused.

The filing fee in the amount of \$300 is being transmitted electronically with this submission. Any deficiency in the fee should be charged to Deposit Account No. 08-2623.

Dated this 28th day of October, 2015.

Respectfully submitted,

/Larry H. Tronco/

Larry H. Tronco

Betsy D. Proffitt

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**Attorneys for Opposer,
Boulder Brands USA, Inc.**

CERTIFICATE OF SERVICE

I certify that on October 28, 2015, I served a true and correct copy of the above NOTICE OF OPPOSITION to the following by U.S. Express Mail, postage prepaid:

Vincent J. Elders, Esq.
Smith, Landmeier & Elders, P.C.
15 N 2nd St.
Geneva, Illinois 60134-2224

Courtesy copy sent via email:
trademarks@smithlandmeier.com

/Larry H. Tronco/
Larry H. Tronco